APPENDIX A

OPINION OF THE COURT OF APPEALS

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 20,201

Sunny Hill Farms Dairy Co., Inc.,
Plaintiff-Appellee,
v.
Clifford Hardin, Secretary of Agriculture,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

[August 25, 1971.]

Before VAN OOSTERHOUT, Senior Circuit Judge, HEANEY, Circuit Judge, and HANSON, District Judge.

HEANEY, Circuit Judge.

The primary question raised on this appeal is the validity of an amendment to the St. Louis, Missouri, Milk Marketing Order. The amendment requires handlers with plants in three southern counties of the marketing area to pay producers an additional fifteen cents per hundredweight for milk. The District Court held that the differential was not a statutorily permissible one.

The detailed facts are found in the various administrative hearings and in the decision of the District Court.[1] We restate only those facts necessary to an orderly exposition of the issues.

In May, 1963, various amendments to the St. Louis Marketing Order were proposed. Sunny Hill Farms Dairy Company, a regulated handler with a plant in Cape Girardeau, Missouri, proposed that six new counties be added to the St. Louis marketing area.[2] Others proposed that a price differential of twenty-six cents per hundredweight would be necessary in some of the newly added counties to align prices in those counties with nearby marketing areas in Kentucky, Tennessee and Arkansas. Sunny Hill took no position on this issue.

The hearing examiner recommended addition of the six counties but declined to recommend either a plus or minus differential for handlers located in any of the new counties. 29 Fed. Reg. 6630 (1964).

Interested parties were given an opportunity to file exceptions to the proposed findings. None was filed by Sunny Hill, and it was not notified that exceptions to the recommendations with respect to the differential had been filed by others.[3]

The Assistant Secretary of Agriculture, after reviewing the record and the exceptions, modified the recommended decision with respect to differentials. He concluded:

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[1] *Sunny Hill Farms Dairy Company v. Freeman*, 307 F.Supp. 392 (E.D. Mo. 1969). For an earlier proceeding involving Sunny Hill, see *United States v. Sunny Hill Farms Dairy Company*, 258 F.Supp. 94 (E.D. Mo. 1966).

[2] The counties were Cape Girardeau, Bollinger, Jefferson, Perry, St. Francois and Ste. Genevieve.

[3] Sunny Hill made a point of this fact at the 1967 administrative hearings. It contended that the failure to notify it that exceptions had been filed to the examiner's report was a violation of due process. This issue has not been raised on this appeal.

"* * * a price 15 cents per hundredweight above the St. Louis price would be more appropriate for the Cape Girardeau area. Such a price appears necessary to assure an adequate supply for plants in the area, and also provide for better alignment of prices between orders.

"At the present time there are no plants located in the counties of Perry and Ste. Genevieve. If a plant were to be located in these counties, the Class I price should be the same as at Cape Girardeau to assure proper price alignment with markets to the south."

29 Fed. Reg. 15130, 15139 (1964).

The Assistant Secretary gave these reasons for his decision:

(1) Unless the existing order were amended, a location differential of minus twenty-two cents would be applicable at the Sunny Hill plant.

(2) Producer milk should be priced in relation to its location value. Generally, in order to obtain an adequate supply of milk, markets south of the surplus milk production area in Minnesota and Wisconsin require progressively higher prices corresponding to the increased cost of transporting milk from such alternative supply areas.[4]

(3) Cape Girardeau is approximately 120 miles south of St. Louis, and is located near other marketing areas in which a higher price for milk is paid.

(4) Sunny Hill had traditionally purchased most of its milk from producers located in Cape Girardeau County at a price approximately fifteen cents per hundredweight above the minimum prices received by producers in the county who supplied regulated handlers in St. Louis and the suburban St. Louis market.

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[4] For a discussion of the general validity of this premise, see Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J. LAW & ECON. 51 (1967).

The Assistant Secretary's order became effective on February 1, 1965. 29 Fed. Reg. 18049.

Sunny Hill operated under the order for approximately a year. In January of 1966, it filed a petition with the Secretary of Agriculture, pursuant to 7 U.S.C. §608c (15)(A), alleging that it was being damaged because it had to compete with other producers in St. Louis paying the lower St. Louis price. It challenged the fifteen-cent differential as being unlawful because:

(1) The differential resulted in the taking of Sunny Hill's property without due process of law.

(2) The differential constituted an economic trade barrier which limited and discouraged Sunny Hill from selling processed fluid milk in the city of St. Louis.

(3) The differential applied exclusively to Sunny Hill, contravening the Fifth Amendment to the United States Constitution.

(4) The differential was arbitrary in that it did not tend to effectuate the purpose of the act to encourage a sufficient quantity of pure and wholesome milk.

A hearing was held on these contentions. The hearing examiner found that Sunny Hill had failed to demonstrate that the differential was not in accordance with law, and he accordingly recommended that the petition be dismissed. He found that:

(1) The differential could be sustained either as a location adjustment or as a market differential customarily applied, stating:

> "There [was] specific statutory authority for the differentials in question. Section 8c(5) of the act authorizes the use classification of milk and the fixing of minimum class prices, which prices 'shall be uniform as to all handlers, subject only to adjustments for (1) volume, market and production differentials

> customarily applied by the handlers subject to such order, . . . and (3) the locations at which delivery of such milk . . . is made to such handlers.' 7 U.S.C. §608c(5)(A). * * * The Assistant Secretary found that milk in the three-county area in question [Cape Girardeau, Perry and Ste. Genevieve Counties] has a higher value than milk in St. Louis, that the differential would provide better alignment of prices between the St. Louis order and other orders in adjacent marketing areas, and that [Sunny Hill] customarily paid [its] producers about 15 cents more than the minimum prices applicable at St. Louis. * * *"

(2) The fact that Sunny Hill's profit had declined approximately forty percent during the year because of the differential did not amount to a taking of its property without due process.

(3) The fact that Sunny Hill was the only handler in the three-county area did not violate due process, because it was reasonable to divide the marketing area into two zones. Furthermore, the differential was by its terms applicable to any handlers entering the market in the future.

(4) There was no trade barrier within the meaning of the statutory prohibition against such barriers.

(5) Sunny Hill had not challenged the sufficiency of the evidence in support of the Secretary's findings that the differential was necessary to ensure an adequate supply of milk for the Cape Girardeau area.

Sunny Hill took exceptions to the examiner's conclusions and again requested an order which would eliminate the fifteen-cent location differential.

The Secretary denied the relief requested by Sunny Hill and dismissed the petition. *In re Sunny Hill Farms Dairy*, AMA Docket No. M 62-2 (U.S.D.A., March 30, 1967).

Sunny Hill then commenced this action in the United States District Court. Motions for summary judgment

were made by Sunny Hill and the Secretary. The District Court granted Sunny Hill's motion on the grounds that the fifteen-cent differential was not permissible under the statute. It held that the differential was not a "location differential," stating:

> "* * * In the present case, the differential relied on by the Secretary is a location differential or a market differential based on location, and the differential cannot be sustained as to either. The record and the final decision reflecting the facts of the record upon which it is based clearly show that as a 'differential customarily applied by the handlers' it was not based on the location, transportation costs or nature of the market, but on the use to which milk was previously put by the handler, a prohibited basis for adjustment to the uniform price. The primary justification for the Order is price alignment with neighboring markets. Such a differential is not specifically authorized by Section 8c(5)(B), but the creation of an orderly market is an objective of the Act. There is no rational basis for singling out plaintiff as the only handler in the entire marketing area to be a buffer between marketing areas when it is undisputed that 69% of its sales are in the St. Louis marketing area. * * *"

Sunny Hill Farms Dairy Company v. *Freeman*, 307 F. Supp. 392, 400 (E.D. Mo. 1969).

The Secretary of Agriculture appeals. He contends initially that the question of the validity of the differential under the statute was not properly raised in the administrative proceedings leading to this appeal, and that the question was improperly considered by the District Court and cannot now be considered by us.

We are not impressed with this argument. While Sunny Hill's petition of January, 1966, may have been inartful in challenging the validity of the order on the grounds that it was discriminatory and in violation of Sunny Hill's constitutional rights, it would require a highly technical

reading of this record to reach the conclusion that Sunny Hill had not also raised the validity of the Secretary's regulations under the statute. Our review of the entire administrative record convinces us that the question of the validity of the Secretary's action under the statute was very much before the Secretary in all administrative proceedings. Furthermore, this question was discussed at length in each of the administrative decisions, including the final decision of the Secretary.

It is true that Sunny Hill, at the administrative hearings, did not challenge the sufficiency of the evidence justifying the differential as a permissible one under the statute; but Sunny Hill clearly challenged the statutory right of the Secretary to impose the differential for the reasons advanced.

We turn then to the question of whether the fifteen-cent differential was statutorily permissible. We believe that it was. It not only fits within the literal definition of a location adjustment permitted by the Act, but was found by the Secretary to be necessary to assure an adequate supply of milk for the plants in the area and to provide for better alignment of prices between orders. No challenge was lodged as to the sufficiency of the evidence to support these findings.

The District Court relied on *Zuber* v. *Allen*, 396 U.S. 168 (1969), in finding the differential statutorily impermissible. In *Zuber*, the Supreme Court held that a nearby differential payment to farmers within a stated radius of a designated market center was contrary to the provisions of Section 8c(5)(B). The Supreme Court declared that the differential was not a location differential for the simple reason that it was not dependent on the location at which the delivery of milk to a handler was made, but was rather dependent on the location of a producer's farm with reference to the primary market. The Court

stated that the differential could thus be justified, if at all, only as a "market differential customarily applied" and that it could be so justified only if it had as a purpose providing compensation to producers for rendering an economic service. The Court held that the nearby differential could not be so justified. The Court pointed out that the Secretary had failed to advance any economic justification for the nearby differential. It further noted that the differential was included in the original order as a recognition of the favored position of nearby producers in the fluid market and as an inducement to them to approve the order. We find nothing in *Zuber* v. *Allen, supra,* that requires reversal of the case before us. The differential here is based on the handler's location rather than the producer's and is not for the purpose of providing benefits to nearby producers.

A recent decision of the Court of Appeals for the District of Columbia is more in point. *Fairmont Foods Company* v. *Hardin,* 442 F.2d 762 (D.C. Cir.1971). In *Fairmont,* a location differential was involved. There, as here, the Secretary divided a marketing area into three zones. Handlers in the central zone were required to pay producers a fifteen-cent differential, and handlers in the western zone were required to pay producers a forty-cent differential. The Secretary found that the differential was necessary to reflect the cost of moving milk from the eastern to the central and the western zones, and to align the prices in the central and western zones with the higher prices in the adjacent Colorado and Black Hills marketing areas. On appeal, the Court held that the differential could not be justified under the statute as there was no support in the record for the Secretary's finding that higher prices were necessary to reflect the cost of moving milk from east to west. It pointed out that the record showed that the basic movement of milk in the Nebraska marketing area was from the west to the east. It added:

> "If there is a slight deficit in the western zones on occasion, due to the Coop's desire to take advantage of the higher Colorado prices, that does not warrant deviation from the uniform price payable by handlers, which the Act contemplates as the norm for milk marketing orders."

Id. at 770.

The Court also found that there was no support in the record for the Secretary's finding that the higher price in the central and western zones was necessary to avoid serious disruption of the eastern Colorado marketing area. It noted that in handling this problem through the Nebraska order, the Secretary had imposed the burden of higher prices on all handlers receiving milk within the central and western zones whether or not they intended to market that milk in Colorado. The Court further noted that very little milk was sold by Nebraska handlers in Colorado, and that, to the contrary, Colorado handlers accounted for a substantial share of milk marketing in western Nebraska. The Court concluded by saying:

> "* * * Assuming that intra-Order differentials may constitute a proper means of dealing with dislocations between western Nebraska and eastern Colorado, there was insufficient need in this case for their application."

Id. at 772.

Fairmont can thus be distinguished from this case on at least three grounds. First, the sufficiency of the evidence to support the Secretary's findings was challenged in *Fairmont* but was not challenged here. Second, there is little evidence in this record to dispute the Secretary's finding that the order was necessary to maintain a sufficient supply of milk in the Cape Girardeau area. On the contrary, the record indicates that Sunny Hill paid a premium to Cape Girardeau producers to obtain an ade-

quate supply of milk before the order was issued, and that after the order was issued, it still paid approximately fifteen cents per hundredweight to producers not covered by the order to obtain an adequate supply of milk during some seasons of the year. Third, there is little evidence to contradict the Secretary's finding that the fifteen-cent differential was necessary to align the Cape Girardeau prices with those in Memphis. Indeed, the record shows affirmatively that Sunny Hill sold approximately nineteen percent of its milk in the Memphis marketing area at a price in excess of that established for the Cape Girardeau zone. The president of Sunny Hill conceded that, were the differential removed, he would have an advantage in the Memphis area:

> "* * * The Memphis market may be put at a competitive disadvantage, and that's their problem. The fact that I am put at a competitive disadvantage in the Cape Girardeau market is my problem, and this is what I am trying to work out. So whether or not I would have a competitive advantage over the Memphis market is definitely a problem, but it is not my problem."

We find that the problem referred to was one for the Secretary of Agriculture, who has the responsibility for carrying out the broad purposes of the legislation.

The *Fairmont* Court stated in a footnote:

> "The Secretary argues, among other things, that the differentials set by this Order are based on the 'locations at which delivery . . . is made to . . . handlers,' and thus fit within the literal definition of a location adjustment permitted by the Act, 7 U.S.C. §608c(5)(A)(3). We cannot agree, however, that a mere difference in location is sufficient reason to require one handler to pay higher prices than another governed by the same Order. There must still be some relation between the price differential and economic benefit."

Fairmont Foods Company v. Hardin, supra at 767, n. 23.

We agree that a differential is not a location differential within the meaning of the Act simply because the Secretary calls it one. We also agree that the Secretary is not free to establish a differential for every location at which milk is delivered to a handler. He always has the additional burden of establishing that the differential is, in fact, based upon the handler's location and that it is required to accomplish the broad purposes of the Act. We feel that the Secretary has borne both of these burdens here.[5]

Sunny Hill raises two additional issues: first, that the location differential discriminated against Sunny Hill and, second, that it created an impermissible trade barrier.

The District Court found that the differential was unlawfully discriminatory because there was no rational basis for it. The court said:

> "* * * There is no reasoned basis for separating out and distinguishing plaintiff from all other regulated handlers in the St. Louis marketing area. * * *"

Sunny Hill Farms Dairy Company v. *Freeman*, *supra* at 399.

The essence of this argument has been met in the earlier sections of this opinion. In our view, there was a reasonable basis for distinguishing between handlers in Cape Girardeau, Ste. Genevieve and Perry Counties, and handlers in the remaining marketing area. As we have pointed out, the Secretary properly found that the milk had a higher location value at Cape Girardeau than it did in St. Louis.

Because the District Court ruled in favor of Sunny Hill on other grounds, it was not required to discuss Sunny Hill's contention that the differential constituted an eco-

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[5] *Zuber v. Allen*, 396 U.S. 168 (1969); *United States v. Rock Royal Co-operative*, 307 U.S. 533 (1939); *H. P. Hood & Sons v. United States*, 307 U.S. 588 (1939).

nomic trade barrier prohibited by 7 U.S.C. §608c(5)(G). Since we have reversed the trial court on the other grounds, however, we must consider this contention.

Section 8c(5)(G) provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The order promulgated by the Secretary obviously does not prohibit Sunny Hill from marketing milk purchased by it in the St. Louis area or, for that matter, in the Memphis or Paducah areas. The order does make it less profitable for Sunny Hill to sell in the St. Louis market than it would be were Sunny Hill not required to pay its producers the fifteen-cent differential. But the differential is specifically authorized by the Act and reasonable under the circumstances of the case. It thus cannot be construed as establishing an illegal trade barrier. If all location differentials were to be so construed, nothing would be left of the Secretary's power to promulgate milk marketing orders.

In our view, neither *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76 (1962), nor *Polar Ice Cream & C. Co.* v. *Andrews*, 375 U.S. 361 (1964), indicate a contrary result, the former because it involved clearly unreasonable compensatory payments and the latter because it involved purchase and allocation requirements imposed upon distributors by a state government.

In summary, we hold that on the basis of the record presented to us, the zoning of the St. Louis milk marketing area was statutorily and constitutionally permissible.

The judgment of the District Court granting summary judgment to Sunny Hill is reversed. The case is remanded

to the District Court with directions to enter summary judgment in favor of the Secretary of Agriculture.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENT OF THE COURT OF APPEALS

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 20,201

September Term, 1970

Sunny Hill Farms Dairy Company, Inc., Appellee,

vs.

Clifford Harding, Secretary of Agriculture, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, granting summary judgment to Sunny Hill Farms Dairy Company, Inc., be and it is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court with directions to enter summary judgment in favor of the Secretary of Agriculture in conformity with the opinion of this Court this day filed herein.

August 25, 1971.

APPENDIX C

OPINION OF THE DISTRICT COURT

United States District Court
Eastern District of Missouri
Southeastern Division

No. S 67 C 19

Sunny Hill Farms Dairy Co., Inc., Plaintiff

v.

Orville Freeman, Secretary of Agriculture, Defendant

MEMORANDUM OPINION

HARPER, Chief Judge.

This matter is presently before the court on motions by both plaintiff and defendant for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This action instituted by the plaintiff, Sunny Hill Farms Dairy Company, Inc., is a bill in equity to review the administrative ruling by the United States Secretary of Agriculture dismissing a petition filed by the plaintiff pursuant to Section 8c(15)(A) of the Agricultural Marketing Agreement Act, as amended (7 U.S.C. § 601 et seq.) (the "Act"). This review proceeding was commenced by the filing of a complaint pursuant to Section 8c(15) (B) of the Act. The Secretary has answered the complaint and filed a certified copy of the ruling together with the record upon which it is based.

Clifford Hardin, Secretary of Agriculture of the United States has been substituted as defendant for the reason that Orville Freeman no longer holds that office and Clif-

ford Hardin has succeeded him in office and is now Secretary of Agriculture.

The administrative action which this proceeding seeks to review was brought under Section 8c(15) (A) of the Act, wherein Sunny Hill challenged the legality of a location differential contained in an amendment of February 2, 1965, to Federal Order Number 62 ("Order") regulating the handling of milk in the marketing area of St. Louis, Missouri. The location differential provision is retained in Section 1062.52 of the Order and Sunny Hill is attacking that portion of the differential that places a plus factor of fifteen cents per hundredweight on milk purchased by Sunny Hill.

In this proceeding, the function of the court is to determine whether the ruling, on the record, is in accordance with the law. 7 U.S.C.A. § 608(c) (15) (B); United States v. Mills, 315 F.2d 828 (4th Cir. 1963), cert. denied, Mills v. Freeman, 375 U.S. 819, 84 S.Ct. 57, 11 L.Ed.2d 54. A trial *de novo* cannot be conducted; no new issues may be injected into this review proceeding. Queensboro Farm Products v. Wickard, 137 F.2d 969 (2nd Cir. 1943).

Prior to February 2, 1965, Sunny Hill was not a regulated handler under any Federal Marketing Order. Sunny Hill Farms Dairy Company, Inc., is a Missouri corporation, with its registered office at Cape Girardeau, Missouri. The county of Cape Girardeau was not then included in the St. Louis marketing area. In June, 1963, hearings were held in St. Louis relating to proposed amendments to the St. Louis marketing order, wherein Cape Girardeau County and other Missouri counties between Cape Girardeau County and the St. Louis marketing area would be included in the St. Louis marketing area.

In May, 1964, the Department of Agriculture issued a recommended decision in which the Missouri counties as proposed were included in the St. Louis marketing area.

It further recommended that handlers in the newly included counties pay the same price for milk as the St. Louis handlers. Exceptions were filed to the recommended decision. On November 5, 1964, the Department of Agriculture issued its final decision which modified the recommended decision. The final decision provided for an additional fifteen cents per hundredweight above the minimum price for milk for handlers in the counties of Cape Girardeau, Perry and Ste. Genevieve. It further set up two zones with mileage to be calculated from either St. Louis or Cape Girardeau, depending on which one the plant was closer to. (7 C.F.R. 1062.52). The Order became effective February 1, 1965.

On February 2, 1966, Sunny Hill filed its administrative proceeding under Section 8(15) (A). In May, 1966, a hearing was held and in January, 1967, a recommended decision was made dismissing the petition. On appeal to the Secretary of Agriculture, the recommended decision was sustained.

A brief summary of the Milk Marketing Order and certain pertinent facts of the case is in order. Under the Order, milk is classified according to the use made of it by milk companies or "handlers". Class I milk is fluid milk and Class II milk is used to manufacture such products as cheese, butter and ice cream. The Order establishes a minimum price for each class of milk.

The purpose and reasons for the milk marketing program are fully described in Judge Frank's opinion in Queensboro Farm Products v. Wickard, 137 F.2d 969, 974 (2nd Cir. 1943). See also United States v. Rock Royal Cooperative, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446, and Lewes Dairy, Inc. v. Freeman, 401 F.2d 308 (3rd Cir. 1968). In *Lewes*, at pp. 311-312, the court summarizes:

> "These established prices reflect those which would usually be paid for milk depending on use value. Be-

cause of the price differential in an unregulated market, where the supply of fluid milk is greater than the demands of the fluid milk market, chaotic conditions often resulted among producers each seeking to benefit from the greater use value, and therefore the higher price paid for milk used in fluid form. One of the major purposes of the Agricultural Marketing Agreement Act was to create and maintain an orderly market and, in so doing, assure the dairy farmer an adequate minimum price for the milk he delivered to the handlers regardless of how the milk was later used. To avoid the often destructive competition of the unregulated market, a method was devised whereby handlers are required to pay at least a uniform 'blend' price to the producers regardless of the use to which it has been put. * * * In promulgating a marketing order the Secretary must consider the supply of milk upon which the market * * * regularly and normally depends. * * * The regulatory scheme was designed to affect those plants of handlers which have substantial business in the market area. * * * The net result of the regulation is that handlers pay for the milk according to its use value to them while the producer farmers are protected from the perilous competition for the fluid milk market by the automatic allocation to them of the blend price which apportions the profitable fluid milk market and the burdensome surplus market among all the producers that serve the marketing area."

Sunny Hill operates one milk plant located in Cape Girardeau County, Missouri. Sunny Hill's sales area includes Cape Girardeau and Bollinger Counties (50%); St. Louis (19%); Memphis, Tennessee (21%); Paducah, Kentucky (4%); and unregulated areas (6%). Sales in the existing St. Louis marketing area are, therefore, sixty-nine percent of its total sales. Ninety percent of its sales are Class I sales, that is, the sale of fluid milk.

In the present case, Sunny Hill is the only regulated handler in Cape Girardeau County. There are no regu-

lated handlers in Ste. Genevieve and Perry Counties. The Order specifically recognizes that fact, but states that should there be other regulated handlers in those counties, the same provisions of the Order as apply to Sunny Hill would be applicable. Sunny Hill asserts that the Order is unlawfully discriminatory for the reason that it is the only handler in the marketing area that is required to pay an additional fifteen cents per hundredweight above the minimum price. Sunny Hill further alleges that the additional fifteen cents constitutes an unlawful trade barrier. Sunny Hill seeks relief in the form of the removal of the fifteen-cent location differential now required by Section 1062.52(a) and the deletion of Cape Girardeau as a base for zoning.

The statutory authority for location differentials is found in 7 U.S.C.A. § 608(c)(5)(A):

> "(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> "(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

The pertinent parts of the order in dispute are as follows:

"§ 1062.52 *Location Adjustments to Handlers.* (a) for producer milk which is received at a pool plant located more than 30 airline miles from the City Hall in St. Louis, Missouri, which is classified as Class I milk, and for other source milk for which a location adjustment credit is applicable, the price specified is § 1062.51(a) shall, except as provided in subparagraphs (1), (2), and (3) of this paragraph, be reduced by 16 cents per hundredweight plus one cent for each 10 miles or fraction thereof that such distance exceeds 40 miles.

"(1) At a pool plant located more than 30 airline miles from the City Hall in St. Louis but located in Madison, Monroe or St. Clair County or in Sugar Creek, Looking Glass, St. Rose, Breese or Germantown Township in Clinton County, all in the State of Illinois, the price specified in § 1062.51(a) shall be reduced 10 cents per hundredweight; and

"(2) At a pool plant located in Cape Girardeau, Perry, or Ste. Genevieve County, Missouri, the price specified in § 1062.51(a) shall be increased 15 cents per hundredweight; and

"(3) At a pool plant outside the counties of Cape Girardeau, Perry or Ste. Genevieve and more than 30 airline miles from the City Hall in Cape Girardeau but nearer to the City Hall in Cape Girardeau than to the City Hall in St. Louis, the price specified in § 1062.51(a) shall be reduced one cent plus an additional one cent for each 10 miles or fraction thereof that such distance exceeds 40 miles from the City Hall in Cape Girardeau.

"(b) For purposes of calculating such adjustment, transfers between pool plants shall be assigned Class I disposition at the transferee plant, in excess of the sum of 95 percent of the receipts at such plant from producers and cooperative associations pursuant to 1062.12(d), and the volume assigned as Class I to receipts from other order plants and unregulated country plants, such assignment to be made first to

transferor plants at which no location adjustment credit is applicable and then in sequence beginning with the plant at which the least location adjustment would apply."

The pertinent parts of the final decision, reflecting the facts upon which it is based, on November 5, 1964, pertaining to location differentials is as follows:

"9. *Location differentials.*

(a) The St. Louis order location differential provisions should be modified by providing for adjustments in the Class I and uniform prices of: (1) plus 15 cents per hundredweight at pool plants located in Cape Girardeau, Perry, or Ste. Genevieve County, Missouri; and (2) minus 10 cents per hundredweight at pool plants located more than 30 miles from the City Hall in St. Louis but located in Madison, Monroe or St. Clair County or in Sugar Creek, Looking Glass, St. Rose, Breese or Germantown Township in Clinton County, all in the State of Illinois. The City of Cape Girardeau should also be added as a basing point.

"Under the St. Louis order Class I and uniform prices are reduced 16 cents at plants in the 30-40 mile zone and an additional cent for each mile or fraction thereof beyond 40 miles from the City Hall in St. Louis.

"The expansion of the marketing area recommended herein would regulate city plants beyond 40 miles from the City Hall in St. Louis. One such plant is located at Cape Girardeau, Missouri, approximately 120 miles south of St. Louis. Under the present order a location differential of minus 22 cents would be applicable at this plant. Several witnesses proposed that the order provide for a plus differential of 26 cents at Cape Girardeau. The proponents argued that the plus differential would be necessary for price alignment with markets in Kentucky, Tennessee and Arkansas.

"Producer milk should be priced in relation to its location value. Generally, in order to obtain an ade-

quate supply of milk, markets south of the surplus milk production area (Minnesota and Wisconsin) require progressively higher prices for milk corresponding to the increased cost of transporting milk from such alternative milk supply areas.

"Cape Girardeau is approximately 120 miles from St. Louis. It is located on the southern fringe of the supply areas for the St. Louis and Suburban St. Louis Markets. Milk produced on farms immediately south of Cape Girardeau (in Scott and Mississippi Counties) is purchased by an unregulated handler located in Sikeston, Missouri (31 miles south of Cape Girardeau). The Sikeston handler pays his producers the St. Louis order Class I price plus 20 cents for milk received from them. The Paducah, Kentucky, marketing area is directly east of Mississippi County. The Class I and blend prices under the Paducah order exceeded the St. Louis order prices by an average of 14 cents and 30 cents, respectively, during the 12-month period preceding the time of the hearing.

"The handler at Cape Girardeau purchases most of his supply of milk from producers located in Cape Girardeau County. His pay price to producers has been about 15 cents per hundredweight above the minimum prices received by producers in the county who supply regulated handlers located in St. Louis and in the Suburban St. Louis market.

"The Recommended Decision provided for a price at Cape Girardeau equal to the f. o. b. St. Louis price. However, after a careful review of the record in light of the exceptions to the recommended decision, it is concluded that a price 15 cents per hundredweight above the St. Louis price would be more appropriate for the Cape Girardeau area. Such a price at Cape Girardeau appears necessary to assure an adequate supply for plants in the area and also provide for better alignment of prices between orders.

"At the present time there are no plants located in the counties of Perry and Ste. Genevieve. If a plan[t] were to be located in these counties, the Class I p[rice] should be the same as at Cape Girardeau to a[ssure] proper price alignment with markets to the sout[h]

"The City of Cape Girardeau should also be added as a basing point for determining location differentials at plants located near Cape Girardeau but outside the Counties of Cape Girardeau, Perry and Ste. Genevieve. At the present time no plants so located are expected to become subject to regulations. However, should a plant in such a location become regulated, the prices applicable at such plant should be aligned with those at Cape Girardeau.

"In addition to the exceptions filed regarding the recommended price in the Cape Girardeau area, several requests were made to reopen the hearing to reconsider the issue. Careful consideration of the information supplied with the requests to reopen the hearing does not warrant such action. There is no reason to believe from such information that the proposed amendments provided herein would not be appropriate for adoption at this time. Therefore, the requests for reopening of the hearing must hereby be denied."

Thus, the final decision of November 4th is primarily designed to properly align the St. Louis marketing area and areas to the south and to account for the fact that before regulation Sunny Hill had paid producers about 15 cents per hundredweight above the minimum price.

Zuber v. Allen, 131 U.S.App.D.C. 109, 2 F.2d 660, 672-673 (1967) defines the permissible differentials as follows:

"But the only 'location' differential permitted by the Act is one for 'the location at which delivery' of the milk is made to the handler. Plainly, this exception was designed to recognize differences in transportation costs only." * * * (p. 672.)

"* * * The Committee Reports in respect of the 1935 Act are explicit that 'the market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant.' * * * (p. 673.)

"The purpose of establishing zone differentials is to achieve a high degree of uniformity in prices to all

handlers f. o. b. the market for milk which is received from producers at plants located at various distances from the principal consumption area. To achieve this purpose, the zone differentials must closely reflect costs generally incurred in receiving milk at country plants and moving such milk to city plants." (Footnote 39, p. 673.)

Undisputedly, it is the function of the Secretary in promulgating marketing orders to provide for an orderly market. In so doing, he may look at all aspects and conditions of the market. And absolute equality is not required in order that the operation of the order be sustained. United States v. Mills, 315 F.2d 828, 838 (4th Cir. 1963) cert. denied, Mills v. Freeman, 375 U.S. 832, 84 S.Ct. 57, 11 L.Ed.2d 54. But the powers of the Secretary are not unlimited. Blair v. Freeman, 125 U.S.App.D.C. 207, 370 F.2d 229 (1966). In testing the Order here, consideration is given to the narrow confines of the Secretary's power and the determination of the validity of the Order in view of the purported source of authority and the underlying rationale disclosed by the record.

Plaintiff sells approximately 69% of its milk in the St. Louis marketing area. The remaining sales are in southern markets and unregulated areas. Plaintiff enjoys a price advantage over handlers in the southern areas. In its brief, the Secretary argues that the disadvantage to plaintiff in the cost of milk in the St. Louis marketing area is offset by the advantage plaintiff receives in its sales of milk in the southern markets. We are not impressed by this rationale. The Order in this case does not and cannot regulate sales in marketing areas governed by other marketing orders. If the handlers in southern markets are unduly disadvantaged, the southern market orders are appropriate vehicles for correcting it. Each order's function is to regulate sales of milk within the marketing area governed by it. Sales within a marketing area of milk brought in from outside the area can be provided for by

the order governing the area where the sales are made. See Lehigh Valley Coop. v. United States, 370 U.S. 76, 82 S.Ct. 1168, 8 L.Ed.2d 345 (1962); Fitchett Bros. v. Freeman, 241 F.Supp. 181 (S.D.N.Y. 1965).

Within the St. Louis marketing area plaintiff suffers a 15 cent per hundredweight disadvantage in the cost of its milk. This location differential is based upon the location at which the delivery of the milk is made to the Sunny Hill plant as required by the terms of Section 8c(5)(A) of the Act. But, as stated in *Zuber*, supra, 402 F.2d at 672: "Plainly, this exception was designed to recognize differences in transportation costs only." In this connection there is no evidence in the record to support the differential. There is no evidence as to the transportation costs of producers who deliver milk to Sunny Hill's plant or producers who deliver milk to other plants in the St. Louis area. And nothing in the Order or the final decision of November 5th indicates that the differential was in recognition of differences in transportation costs. The 15 cent differential cannot stand as a location differential.

If the differential is to be sustained, it is as a market differential. The market differential is given to a producer to compensate him for the distance involved in delivering his milk. *Zuber*, supra, at 673. The defendant contends that the present differential can be sustained since Sunny Hill before being regulated customarily paid producers more than the minimum price.

Prior to being regulated Sunny Hill sought to obtain 100% Class I usage, and bought only milk from its producers to fill its requirements for Class I usage. Sunny Hill's producers had to find other outlets for their surplus milk. For that reason, Sunny Hill paid its producers a premium on the milk it bought for Class I usage. Since becoming regulated, Sunny Hill buys all of its producers' milk and there is no problem of surplus milk. Under the

Order the producers are guaranteed a minimum price for their milk and are thus realizing the full value of their milk. The premium paid to producers did not give Sunny Hill's producers an advantage over producers who sold to regulated handlers. Similarly, removing the differential under the Order does not place Sunny Hill's producers at a disadvantage. Rather, there would then be a "uniform price" to all producers selling milk to regulated handlers.

The court is aware that the Order is based in part upon the finding that Sunny Hill had customarily paid its producers a premium for milk. The evidence pertaining to the premium shows that it was based upon the "use" value of the milk to Sunny Hill—Class I usage. A premium based on the use value of milk is clearly not authorized by the Act. In fact, the use value is a basis that is prohibited by the Act. The court in Blair v. Freeman, supra, 370 F.2d at 237, said: "We hold that, irrespective of motive, the Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers."

Thus, while Sunny Hill producers give up the benefit of a premium, they obtain the benefit of a uniform or blended price for all of their milk which may be higher than in the absence of regulation.

Sunny Hill's producers still deliver to the same plant in Cape Girardeau. The Secretary was authorized to award a market differential to a producer "to compensate him for delivering his milk to a city market instead of to a country plant," H.R.Rep.No.1241, 74th Cong. 1st Sess. 10 (1935). The premium that had customarily been paid by Sunny Hill prior to regulation was not based upon the nature of the market at which the producers delivered their milk, but rather upon the use of the milk by Sunny Hill in Class I utilizations. As a matter of fact, under the

Order, producers in Cape Girardeau county delivering milk to handlers located in St. Louis and suburban St. Louis are not receiving a differential to compensate them for the added cost of moving the milk from more distant points to a city market. Rather, Sunny Hill's producers are being compensated while delivering to a country plant instead of to a city market—the reverse of the stated object of the market differential. The differential cannot be sustained as a market differential.

Handlers in the St. Louis metropolitan area sell milk in Cape Girardeau, Ste. Genevieve and Perry Counties. It can be assumed that the transportation costs are the same as from those counties to the metropolitan area, thereby equalizing costs of selling milk in metropolitan St. Louis and the "southern fringes" of the St. Louis marketing area. The November 5th decision of the Secretary finds that the differential "appears necessary to assure an adequate supply for plants in the area * * *." While that fact is a proper one on which to base an order, merely stating it does not establish it as true. There is nothing in the record to indicate that Sunny Hill could not obtain an adequate supply of milk at a price equal to that paid by other regulated handlers in the St. Louis marketing area, particularly if the price paid to the producers is the same for all regulated handlers.

The court finds that the 15-cent differential unconstitutionally discriminates against the plaintiff. The fact that plaintiff is the only member of a potential class affected by the provision does not of itself justify a finding of discrimination, although it should be noted that the Secretary stated that no other handlers were expected to become regulated. The finding of unlawful discrimination is based on the fact that there is no rational basis for the differential. There is no reasoned basis for separating out and distinguishing plaintiff from all other regulated handlers in the St. Louis marketing area. The location

differential contained in St. Louis Marketing Order § 1062.52(a) (2) is unauthorized and void. It is, therefore, unnecessary to discuss plaintiff's contention that it constitutes an economic trade barrier prohibited by 7 U.S. C.A. § 608c(5) (G).

Plaintiff also attacked the validity of § 1062.52(a) (3) of the Order (establishing Cape Girardeau as a base zone). This contention appears to have been abandoned by plaintiff inasmuch as plaintiff's memorandum in support of its motion for summary judgment makes no clear reference to that section and plaintiff repeatedly asks relief only in the form of elimination of the 15-cent differential. In any event, plaintiff has failed to show a justiciable interest in adjustments at pool plants outside the counties of Cape Girardeau, Ste. Genevieve and Perry and more than 30 miles from the City Hall in Cape Girardeau, but nearer to such city hall than to the City Hall in St. Louis since no plants are presently in existence or expected to come into existence and, therefore, no adjustments affecting plaintiff in any way have been made or are expected to be made. No facts or allegations are urged in support of the attack on the zone provision save two hypothetical situations which are not illustrative of § 1062.52(a) (3). With respect to § 1062.52(a) (3) plaintiff has failed in its burden of establishing invalidity.

In enacting the 1935 amendments to the Agricultural Adjustment Act of 1933, Congress carefully attempted to delineate and circumscribe the Secretary's powers in order to avoid the delegation problems noted in A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L. Ed. 1570 (1935). Congressional intent is clear that the only authorized departures from the uniform price are enumerated in Section 8c(5) (B). Thus, a differential varying the uniform price cannot be upheld unless it is one of the enumerated adjustments permitted under that section. In addition, the differential can be

sustained only if the Secretary relied upon it as justification when the order was promulgated. In the present case, the differential relied on by the Secretary is a location differential or a market differential based on location, and the differential cannot be sustained as to either. The record and the final decision reflecting the facts of the record upon which it is based clearly show that as a "differential customarily applied by the handlers" it was not based on the location, transportation costs or nature of the market, but on the use to which milk was previously put by the handler, a prohibited basis for adjustment to the uniform price. The primary justification for the Order is price alignment with neighboring markets. Such a differential is not specifically authorized by Section 8c(5) (B), but the creation of an orderly market is an objective of the Act. There is no rational basis for singling out plaintiff as the only handler in the entire marketing area to be a buffer between marketing areas when it is undisputed that 69% of its sales are in the St. Louis marketing area. In fact, aside from the physical location of plaintiff's plant on the southern fringes of the St. Louis marketing area, there is little to differentiate plaintiff from the other regulated handlers in the St. Louis marketing area in terms of market availability and suppliers. The differential is not one of the enumerated adjustments permitted under 8c(5) (B) to vary the uniform price.

Accordingly, defendant's motion for summary judgment is denied and the plaintiff's motion for summary judgment will be sustained. The administrative ruling by the United States Secretary of Agriculture is vacated and set aside and the matter is remanded to the Secretary of Agriculture for such further proceedings as the law may require and as are consistent with this opinion.

/s/ ROY W. HARPER
United States District Judge

October 23, 1969

APPENDIX D

Relevant Portions of The Agricultural Marketing Agreement Act of 1937

7 U.S.C. §608c. Orders regulating handling of commodity —Issuance by Secretary

7 U.S.C. 608c(1)

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. 608c (2)

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk . . .

* * * * * * * *

7 U.S.C. 608c(5)

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use of classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to ap-

portion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * * * * * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in the area of any milk or product thereof produced in any production area in the United States.

* * * * * * * *

7 U.S.C. 608c(15)

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty

days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to Section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

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APPENDIX E

Federal Milk Marketing Order No. 62,
7 C.F.R., §1062, *et seq.*

* * * * * * *

§ 1062.52. Location adjustments to handlers.

(a) For producer milk which is received at a pool plant located more than 30 airline miles from the City Hall in St. Louis, Missouri, which is classified as Class I milk, and for other source milk for which a location adjustment credit is applicable, the price specified in § 1062.51 (a) shall, except as provided in subparagraphs (1), (2), and (3) of this paragraph, be reduced by 16 cents per hundredweight plus one cent for each 10 miles or fraction thereof that such distance exceeds 40 miles.

(1) At a pool plant located more than 30 airline miles from the City Hall in St. Louis but located in Madison, Monroe or St. Clair County or in Sugar Creek, Looking Glass, St. Rose, Breese or Germantown Township in Clinton County, all in the State of Illinois, the price specified in § 1062.51(a) shall be reduced 10 cents per hundredweight; and

(2) At a pool plant located in Cape Girardeau, Perry or Ste. Genevieve County, Missouri, the price specified in § 1062.51(a) shall be increased 15 cents per hundredweight; and

(3) At a pool plant outside the counties of Cape Girardeau, Perry or Ste. Genevieve and more than 30 airline miles from the City Hall in Cape Girardeau but nearer to the City Hall in Cape Girardeau than to the City Hall in St. Louis, the price specified in § 1062.51(a) shall be reduced one cent plus an additional one cent for each 10 miles or fraction thereof that such distance exceeds 40 miles from the City Hall in Cape Girardeau.

* * * * * * *